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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RICK ROSS,

Plaintiff and Appellant,

v.

SUSAN ALLEY, as Trustee, etc.,

Defendant and Respondent.

F056536

(Super. Ct. No. 04CEPR00370)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Gilmore, Wood, Vinnard & Magness, David M. Gilmore and Jody L. Winter, for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Timothy L. Thompson and Todd W. Baxter, for Defendant and Respondent.

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This action involves a dispute between appellant Rick Ross (Ross) and his step-mother, respondent Susan Clarke Ross Alley (Alley), regarding Alley's administration of the Ross Family Trust and Ross Marital Trust. Ross appeals from the trial court's judgment after a court trial, in which the court found Alley had satisfied her obligation to

provide Ross with information concerning the trusts and did not breach her fiduciary duties, although the court ordered Alley to repay to the trusts principal she inadvertently received through her financial adviser. The court also denied Ross's request to remove Alley as trustee. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Marital and Family Trusts

Ross's father, Earl Jackson Ross (Jack Ross), died in February 1996, one month after selling the family owned business Ross & Sons Refrigeration (Ross & Sons). At the time of his death, Jack Ross was married to Alley, who was appointed the executrix of Jack Ross's estate in accordance with his will's terms. The will called for the establishment of two trusts — a marital trust and a family trust — to be funded with Jack Ross's one-half of his and Alley's community property, with Alley designated as the trustee for both trusts and Ross designated as the successor trustee should Alley be unwilling or unable to act or to continue to act as trustee. Together Jack Ross and Alley had seven children — three from Jack Ross's prior marriage (including Ross), two from Alley's prior marriage, and two they adopted after their marriage. Five of the children, one of whom is Ross, are contingent remainder beneficiaries of the family and marital trusts.

The will provides the marital trust shall be distributed as follows: "The Trustee shall pay to or use for the benefit of my wife in monthly or otherwise convenient installments during her lifetime (but in no event in installments paid less frequently than annually), all of the net income of said Trust Estate, plus so much of the principal as the Trustee, in its discretion, may from time to time consider suitable or necessary for the maintenance and support in health and reasonable comfort of my wife having in mind her other sources of income and her other resources which are known to the Trustee."

Similarly, the will provides the family trust shall be distributed as follows: "The Trustee shall pay to or use for the benefit of my wife in monthly installments during her lifetime,

all of the net income of said Trust Estate, plus so much of the principal as the Trustee, in its discretion, may from time to time consider suitable or necessary for the maintenance and support in health and reasonable comfort of my wife, having in mind her other sources of income and her other resources which are known to the Trustee.” The will states the primary concern in establishing the trusts was to provide for the beneficiary entitled to the current distribution of income and principal and not necessarily to preserve the corpus for contingent remainder beneficiaries, which concern the trustee must bear in mind when exercising any discretionary power to pay or apply the trusts’ principal or income.

The will was admitted into probate in April 1996 and the Order for Final Distribution (final order) filed in September 1997. The final order stated the entire estate consisting of 2,425 shares of Ross & Sons common stock was distributed to Alley as trustee of the trusts, and directed Alley to allocate 1,021 shares to the marital trust and 1,404 shares to the family trust.¹ In November 1997, Alley filed a receipt of distributee which stated she received Jack Ross’s community property interest of the 2,425 shares in Ross & Sons, and the trial court issued its order of final discharge, which discharged and released Alley “. . . from all liability to be incurred after this date.” Ross did not object to the distributions the trial court ordered.

Although the final order called for the Ross & Sons stock to be deposited into the trusts, the stock was liquidated into cash, which was deposited into accounts with the assistance of Ross, the family’s accountant George Tamberi and the family’s attorney Michael E. Moss of Kimble, MacMichael & Upton. Alley retained Jack McCarthy, an investment broker who served as an adviser to Ross and Alley before Jack Ross’s death,

¹ When Jack Ross sold Ross & Sons, its 5,000 shares were split between Jack Ross, Ross and Alley, with Jack Ross receiving 2,500 shares, Alley receiving 2,250 shares, and Ross receiving 250 shares.

to assist with managing the trusts' funds. McCarthy provided the specific advice on how to invest the trust funds, but Alley made the final decision regarding the investments. McCarthy transferred the income generated by the investment to Alley's personal checking account monthly.

When the trust accounts were first established, the amounts for each trust were inadvertently interchanged. To correct this, bonds originally purchased for each of the trusts were transferred to the other trust. After the final order was issued, Alley petitioned the court to reopen the estate so she could gain control of municipal bonds, one-half of which belonged to Jack Ross's estate and should have been placed in the trusts. The bonds were subsequently transferred to the trusts. When this was completed, the starting value for the family trust was \$600,000, comprised of the cash liquidated from Ross & Sons, and the starting value for the marital trust was \$621,626.97, comprised of \$432,753.72 of cash liquidated from Ross & Sons and the \$188,873.25 market value of the municipal bonds.

Ross's Requests for Accountings

From the inception of the trusts until 2002, Tamberi was Alley's accountant; he prepared the trusts' tax returns and received year-end account statements from the investment accounts for the trusts. Tamberi never told Alley he believed she was inappropriately managing the trust funds. Moss also received monthly statements on the trusts and never told Alley she was inappropriately managing them. Neither Tamberi nor Moss told Alley she needed to provide annual accountings to the trust beneficiaries.

Beginning in October 2000, a dispute arose between Alley and Ross over a 640-acre ranch located in Whitebird, Idaho, that Jack Ross purchased in 1990. Title to the ranch first was placed in Jack Ross's and Alley's names, but in 1992 Jack Ross quitclaimed his community property interest to Alley. In October 2000, Alley claimed Ross had removed her personal property from the ranch and demanded he stay off the ranch. In response, Ross claimed he held an interest in the ranch and demanded Alley

pay him \$452,541.77 to compensate him for his interest. In December 2001, Ross filed suit against Alley in Idaho, seeking to recover the money he claimed he invested in the ranch.

In April 2002, Ross's attorney sent Alley a letter in which he asserted Alley was obligated to provide the beneficiaries with regular accountings on the status of the trusts and demanded she provide Ross with the trusts' current financial reports and full accounting information. This was the first time Ross had requested Alley provide an accounting. No one had ever informed her she was required to provide accountings and, from her understanding, she was not required to.

In response, Alley sent Ross tax statements and year-end reports on the trusts' accounts. Ross, however, demanded a complete accounting from the trusts' inception. Alley instructed McCarthy to provide Ross with information regarding the accounts and duplicate statements, and asked McCarthy to speak with Ross's attorney. Alley also authorized Moss to release monthly statements and accounting records to Ross. Moss sent Ross's attorney the earliest account statements he had for the two trusts, which were for March and May 1998. Ross acknowledged receiving accounting information showing the status of the trust accounts at inception and as of 2002, but questioned the amounts in the trusts and again requested an accounting. Alley tried to have McCarthy send Ross more information; she also forwarded additional information to Ross's attorney. Ross, however, claimed he only received two statements from McCarthy and two statements Moss sent Ross's attorney.

Alley received a September 2002 letter from Ross's attorney which acknowledged receiving information showing how the funds were invested over time but questioned the amount of money initially placed in the trust and demanded an accounting. Alley, however, felt she had provided all the information available to her. Alley asked Moss to assist her further, but since his firm still represented Ross, she was told the firm could not handle the matter due to a conflict of interest. Alley authorized the release of all Union

Bank information on the trusts. She consulted a local attorney to try to satisfy Ross's demands; after describing to the attorney all of the information she sent to Ross's attorney, the attorney informed her she had satisfied her reporting requirements. Alley believed her attorney had told Ross's attorney he was working on the matter, but before her attorney could complete the accounting, Ross filed a petition in this case.

The First Petition

The petition, filed in December 2002, named Alley as respondent in her capacity as trustee of the trusts. Ross alleged Alley was obligated to prepare and provide annual accountings for the trusts pursuant to Probate Code sections 16061 and 16064,² which she had failed to do despite Ross's repeated requests. Ross also alleged Alley took approximately \$300,000 of principal from one or both of the trusts to construct a home on the Idaho property; she breached her fiduciary duties by failing to provide annual accountings and using the trusts' assets in violation of the trusts' terms; and she violated her duties under the California Uniform Prudent Investor Act. Ross demanded Alley be ordered to provide a full and complete accounting of the two trusts from inception and account to the trusts any amounts improperly taken or lost.

Alley hired William Docker of the McCormick, Barstow law firm to represent her as trustee of the trusts. Alley told Docker she gave Ross copies of the account statements from the two trust investment accounts and tax information regarding the trusts. Docker advised her that while she did not have to provide a formal accounting under the Probate Code or the trusts' terms, she did have a duty to provide a report on reasonable request, which she had satisfied with the information already provided. Nevertheless, he told Alley that under the circumstances she should file an accounting. Docker believed he discussed with Alley the purpose of the trusts and that the trustee is not necessarily

² All subsequent statutory references are to the Probate Code unless otherwise noted.

charged with trying to grow the value of the trusts' assets since the trusts establish a preference to the current beneficiary as opposed to the remainder beneficiaries.

In January 2003, Alley filed her first account current and report of trustee (the report). The report provided a detailed accounting on both trusts from their inception on September 29, 1997, through December 31, 2002. A summary of the accounting, which Docker prepared, shows the income from the marital trust during this time period was \$127,700, while the income from the family trust was \$170,537.70. The marital trusts generated an additional \$16,988.57 in income that Alley never received. The only principal taken was from the family trust totaling \$18,762.30. Nothing in the accounting records showed that Alley had taken \$300,000 of principal from either trust in order to construct a second home on the Idaho property, and Alley denied using any principal for that purpose. Alley paid \$2,000 from her personal funds to prepare the trusts' tax returns. Other than the \$18,762.30 in principal and the income she received, Alley had not taken money out of the trusts during the period the report covered.

Docker asked Ross's attorney to call and discuss any concerns he might have before filing an objection. Docker believed the report was fairly clean, with the exception of the inadvertent payment out of principal, and would have advised Alley to return the principal even though he believed she had grounds to keep it. Instead of contacting Docker, Ross's attorney filed an objection to the report on Ross's behalf which asserted the trusts appeared to have been funded in an amount substantially less than the cash that was in Ross & Sons, and the report did not account for \$300,000 that was to go into the trusts. Ross also objected to the \$18,762.30 principal distribution. Alley filed a response to Ross's objections, along with a first amended first account current covering the period from September 29, 1997 to December 31, 1998 (the first amended report), which amended the beginning accounts to show starting inventory of Ross & Sons' stock and receipts for cash relating to the dissolution of Ross & Sons.

In April 2003, Alley filed a supplement to the first amended report, in which she claimed that due to a misallocation of funds when the trusts were first funded, the family trust was liable to the marital trust in the amount of \$3,313.28, and she was owed \$117,716.34 from the family trust. Ross filed objections, in which he asserted the first amended report failed to provide appropriate reconciliation of the distribution from the estate and funding of the trusts, and that certain asserts were not placed in the trusts when they were first funded. Ross objected to Alley's claim that the family trust owed the marital trust money or that Alley was owed money from the family trust.

In the spring of 2003, Alley retained Ed Huff, a certified public accountant, to prepare the trusts' tax returns for 2002. She later retained Huff to prepare accountings on the trusts; he prepared annual accountings for 2003 and 2004, and beginning in 2005, prepared accountings on a quarterly basis. Huff also advised Alley on the distributions she can take from the trusts. When Alley first retained Huff, McCarthy continued to manage the trusts' investment accounts; Alley, however, eventually transferred the investment accounts to Edward Jones.

The Second Petition

On January 6, 2004, Ross filed a second petition, in which he sought to remove Alley as trustee due, in part, to her alleged failure to properly account for all of the assets that should have been placed in the trusts and her failure to place title to the Idaho property in the trusts. Trial on the first and second petitions commenced in November 2004. At the outset of trial, the trial court granted Alley's motion in limine to preclude Ross from introducing evidence regarding property Ross claimed should have passed through the estate into the trusts, including the Idaho property, since the final order was a conclusive determination of the trusts' assets. By granting the motion, the trial court limited the case to the accounting action and whether Alley should be removed as trustee. As a result of the ruling, Ross dismissed the second petition to remove Alley as trustee

without prejudice. The trial court granted Ross's request to stay the trial on the remaining issue in the first petition pending completion of the Idaho action.

In December 2004, Ross filed a complaint in superior court against Alley, both individually and as trustee of the trusts, to set aside the final order based on extrinsic fraud. Following two successive demurrers the trial court sustained with leave to amend, the trial court sustained Alley's demurrer to the second amended complaint without leave to amend. Ross appealed. In an unpublished decision, we affirmed the judgment after concluding the fraud alleged constituted only intrinsic fraud and Ross failed to adequately plead that he exercised diligence in pursuing the action. (*Ross v. Alley* (June 18, 2007, F050037).)

In August 2005, after trial in the Idaho action, the Idaho court issued a decision. It found against Ross on his claims that he had an express agreement to be reimbursed for money he expended on the Idaho ranch and that he had an interest in the ranch through a resulting trust, but in his favor on his claim of unjust enrichment. Accordingly, the Idaho court ordered Alley to pay Ross \$194,041.77 for the unjust enrichment received from Ross's contributions to the ranch. In October 2005, Alley deposited \$194,041.77 with the Idaho court to satisfy the judgment. The money came from Alley's personal funds, not from the marital or family trust funds. Alley also paid all legal fees for the Idaho action from her personal funds. While Alley inadvertently paid her Idaho attorney \$3,500 from the trusts' funds, she repaid the money to the trusts as soon as she discovered the error.

The Third Petition

In September 2006, Ross filed a third petition, in which he alleged: (1) he had demanded a current accounting on June 26, 2006 as provided by section 16061, which Alley refused to provide; (2) Alley was required to provide information to the beneficiaries annually; (3) Alley used trust funds for non-trust purposes, including paying the Idaho judgment; and (4) Alley was invading the principal of the trusts in violation of

the trusts' terms. Ross requested the court order Alley to provide an accounting and to remove her as trustee due to her purported failure to provide accountings and improper use of trust funds.

Trial on the First and Third Petitions

Trial on the first and third petitions began in March 2008. Alley testified that until the January 2003 report was prepared, she did not know that McCarthy had sent her a distribution from the principal of \$18,762.30, and neither Tamberi nor Moss informed her she had received funds that included principal. Docker testified that in his opinion, McCarthy had made a mistake in sending Alley principal and in his experience, brokerage houses or financial representatives frequently make those kinds of mistakes. In Alley's discussions with Docker, Alley hadn't tried to conduct any analysis to determine if she was entitled to take the principal. None of the beneficiaries had asked Alley for an accounting of the trusts until Alley received Ross's attorney's letter in 2002, and Ross is the only beneficiary who has asked for an accounting.

In Docker's opinion, the trust agreements and the Probate Code entitle Alley to hire accountants, lawyers and other advisors necessary for administration of the trusts, with the trusts paying their expenses. Accordingly, Docker advised Alley to pay for Huff's services at the trusts' expense. Docker also advised Alley that she was entitled to pay the attorney fees incurred in defending against Ross's various lawsuits from the trusts' assets. Alley paid the attorney fees and costs from her personal account; she was then reimbursed at the end of the year from the trusts, with the allocation between the trusts based on advice Alley received from Docker and Huff.

Docker sent Alley a series of letters covering the period from December 2002 to June 2007, which detailed the attorney fees and costs periodically billed by McCormick, Barstow. In these letters, Docker advised Alley she could be reimbursed from the trusts for attorney fees and costs incurred in defending against Ross's lawsuits which named her as trustee of the trusts, since those lawsuits pertained directly to the trusts. With

respect to Ross's separate action to set aside the final order, Docker informed Alley that McCormick, Barstow had set up a separate file number, which it used to keep track of time spent and costs incurred in that action, because "some doubt is cast" as to whether and how much of her legal defense was payable from the trusts since Ross sued Alley both in her individual capacity and as trustee. While the firm believed it was appropriate for Alley to charge her attorney fees and costs to the trusts because she was sued in her capacity as trustee, Docker advised Alley that a court could order her to repay some or all of the fees and costs should it determine the charges were inappropriate.

Since the legal services essentially had been rendered to and benefitted each trust equally, Docker believed it was appropriate to charge each trust one-half of the fees and costs.³ With respect to allocation between income and principal, Docker believed work related to preparation of the accounts, reports and petitions, or to normal trust administration, was chargeable one-half to income and one-half to principal, while the work related to litigation aspects of the cases was chargeable entirely to principal as an extraordinary expense of each trust.

In each letter, Docker provided a breakdown by month of the portion of the fees and costs that should be taken from income and principal, and advised Alley how much she should reimburse herself from the principal of each trust. Docker further advised that if Alley needed to sell assets to reimburse herself from the principal, she should consult her financial advisers to determine the appropriate sales to make. In one letter, Docker stated Alley was not entitled to reimbursement from the trusts for legal services rendered

³ In letters from April and August 2007, Docker noted that the litigation issues had not focused on either trust in particular, except possibly with respect to the distribution of principal from the family trust and with respect to establishing that the "Chah" trailer constitutes an asset of the Marital Trust." Docker further noted, however, that the firm had not separated its time as to services rendered to one trust or the other. At trial, Docker did not have any recollection of the dispute regarding the trailer or whether it involved a matter between Alley and another individual in Idaho.

in connection with an annual payment Ross tendered in 2004 on a note and trust deed held in Alley's personal trust relating to his purchase of property in Fresno. In that situation, Docker allocated those fees and costs entirely to the income from the trusts.

Huff and Alley both testified that the accountings Huff prepared from 2003 through 2007, which were admitted into evidence, were accurate summaries of all activities that took place in the marital and family trusts, taking into account the recommendations from McCormick, Barstow for reimbursement from principal and income for attorney fees, sales and gains in the trust assets, and the disbursement of income. Huff's accounting and tax preparation fees were allocated entirely to income in 2003; in the following years, they were allocated one-half to income and one-half to principal.

In 2003 and 2004, Alley received monthly income distributions from the trusts. In 2005, when Huff started advising Alley regarding distributions, Alley began receiving quarterly income distributions. Huff explained that the net income Alley received was equal to gross income earned less any allocable expenses, including accounting and attorney fees charged to income. Huff was aware of Ross's allegation that Alley used principal from the trusts to pay the \$194,000 judgment he obtained in the Idaho action. He did not see any distribution in that amount from the trusts in 2005.

Huff explained that while the trusts' tax returns show negative taxable income, taxable income is not net income. Huff acknowledged the trusts had suffered losses on trading, which were reflected in the tax returns. Huff explained that when a trust incurs an expense and doesn't have the cash to pay it, a security must be liquidated to pay the expense, thereby generating a loss or gain. Here, Alley had to sell assets in the trusts in order to pay legal expenses. According to Huff, losses incurred from such a sale are not subtracted from income in order to determine the net income for distributions to an income beneficiary.

The Trial Court's Decision

Following closing arguments and post-trial briefing, the trial court issued a statement of decision. The court first found Ross had the burden of proving Alley breached her fiduciary duty. With respect to Ross's claims that he was entitled to annual accountings and further information regarding the trusts, the trial court found: (1) as remainder beneficiaries, Ross and his siblings are not entitled to annual accountings under sections 16061 or 16062, and therefore Alley did not breach her fiduciary duty in failing to provide annual accountings; (2) Alley satisfied her duty under section 16061 to timely provide information that Ross requested concerning the trusts; (3) the information she provided pursuant to the petitions and at trial satisfied her duties under sections 16060 and 16061 to keep Ross reasonably informed and provide information relevant to his interest in the trusts; and (4) other than keeping the remainder beneficiaries reasonably informed as required by section 16060 and providing information pursuant to a future request under section 16061, Alley had no further obligation to provide Ross with information on the trusts.

With respect to Ross's claims that Alley was not entitled to reimbursement for her attorney fees from the trusts and that the fees incurred were excessive, the trial court found: (1) Alley did not improperly cause the need for this litigation and therefore was entitled to be reimbursed for legal fees incurred in defense of this litigation; (2) Alley was entitled to reimbursement for legal fees incurred in her defense of Ross's action to set aside the final order as her defense benefited the trusts to the extent she sought to preserve Jack Ross's original intent in establishing the trusts and specifically responded to Alley's alleged misconduct as trustee; and (3) Ross presented no evidence that the amount of fees charged was unreasonable, therefore it had no basis to find the fees unreasonable.

The trial court further found Alley did not fail in her duty to prudently invest the trusts' assets and the method by which Alley calculated trust income was not improper.

The trial court found that the trusts require an exercise of discretion before principal may be used, namely Alley first must make a discretionary judgment that the use of principal is necessary to her care and comfort after considering her other resources. Since Alley conceded she made no such judgment when she inadvertently received the \$18,762.30 distribution from principal, the court ordered Alley to reimburse the trusts in that amount. The court found, however, that her use of principal was in good faith, as it was unintentional and done in reasonable reliance on her financial advisor's advice, and therefore did not necessitate her removal as trustee. The trial court also found there was no evidence to support Ross's request that Alley be surcharged for invasions of principal, except the \$18,762.30, or that she be removed as trustee. Finally, the trial court denied Alley's request to order Ross to pay attorney fees incurred by the trusts in defending this litigation.

Judgment was entered in conformity with the statement of decision, which also stated the trial court found Alley to be the prevailing party within the meaning of Code of Civil Procedure section 1032. This timely appeal followed.

DISCUSSION

Ross contends the trial court erred in its findings about Alley's obligation to provide accountings, the burden of proof and Alley's invasions of principal, with the exception of the amount the court ordered repaid. Ross maintains the trial court's errors led to an improper conclusion that Alley should not be removed as trustee. We address each contention in turn.

Obligation to Provide Accountings

In his 2002 and 2006 petitions, Ross alleges that Alley is required to provide annual accountings of the trusts, that he is informed and believes she misappropriated trust money, and requests the court order her to provide annual accountings and surcharge her should the accountings reveal any misappropriations. The trial court found that while Alley was not required to provide annual accountings, she was required to provide a

report of information concerning the trusts on request, and that once Ross requested information, she provided it. Ross asserts the court erred in so finding. We disagree.

Under section 16062, subdivision (a), subject to certain exceptions inapplicable here, a trustee is required to “account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee’s discretion to be currently distributed.” Section 16063 lists the information such an account must contain, including a statement of receipts and disbursements of principal and income, a statement of the trust’s assets and liabilities, the trustee’s compensation, and the agents the trustee has hired and their compensation. A remainder beneficiary such as Ross, who is not entitled to current distribution of income or principal, does not have a right to an accounting under section 16062. (*Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 526 (*Esslinger*).)

A remainder beneficiary, however, does have a right to request information from the trustee pursuant to section 16061, which provides, in pertinent part, that “on reasonable request by a beneficiary, the trustee shall provide the beneficiary with a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary’s interest, including the terms of the trust.” (See *Esslinger, supra*, 144 Cal.App.4th at p. 526.) The Law Revision Commission states in its comment to section 16061: “A beneficiary who is not entitled to an annual account under Section 16062 may be entitled to information or a particular account under [section 16061].” (Cal. Law Revision Com. com., 54AWest’s Ann. Prob. Code (1991 ed.) foll. § 16061, p. 52.) As explained in *Esslinger*, “[w]hile an accounting under section 16062 is mandatory, information or a particular account under section 16061, sought by petition

under section 17200, subdivision (b)(7), lies within the probate court's discretion." (*Esslinger, supra*, 144 Cal.App.4th at p. 526.)⁴

The *Esslinger* court summarized the interplay between these sections: "Probate Code section 16062 places a duty on the trustee to provide annual accountings to income beneficiaries. The trustee does not have a statutory duty to account to remainder beneficiaries. However, a remainder beneficiary may request information from the trustee under section 16061. If the trustee does not reasonably comply with the request, the remainder beneficiary may petition to the probate court under section 17200, subdivision (b)(7) to order the trustee to provide information or a particular account if the trustee did not do so voluntarily within 60 days after the beneficiary's request for information under section 16061. The probate court has discretion to grant the petition and order the trustee to account to the remainder beneficiary." (*Esslinger, supra*, 144 Cal.App.4th at p. 528.) Applying these principles to the facts in that case, the *Esslinger* court concluded the trial court did not abuse its discretion when it ordered the trustee to provide a remainder beneficiary formal accounts for the five years preceding the remainder beneficiary's filing of a petition to compel the trustee to provide information or a particular account under section 16061. (*Esslinger, supra*, 144 Cal.App.4th at pp. 528-529.)

In addition to the trustee's duty under section 16061, a trustee has a duty under section 16060 to "keep the beneficiaries of the trust reasonably informed of the trust and its administration." The Law Revision Commission comments to section 16060 explain: "The trustee is under a duty to communicate to the beneficiary information that is

⁴ Section 17200, subdivision (b)(7) provides that proceedings concerning a trust's internal affairs include "[c]ompelling the trustee to report information about the trust or account to the beneficiary, if (A) the trustee has failed to submit a requested report or account within 60 days after written request of the beneficiary and (B) no report or account has been made within six months preceding the request."

reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. [Citation.] Ordinarily, the trustee is not under a duty to furnish information to the beneficiary in the absence of a request for the information. [Citation.] Thus, the general duty provided in this section is ordinarily satisfied by compliance with Sections 16061 and 16062 unless there are special circumstances requiring particular information to be reported to beneficiaries.” (Cal. Law Revision Com. Com., 54A West's Ann. Prob. Code (1991 ed.) foll. § 16060, p. 51.)

The duty imposed under section 16060 cannot be waived and requires a trustee to provide, on request, information that is reasonably necessary to enable the beneficiary to enforce his or her rights under the trust. (*Salter v. Lerner* (2009) 176 Cal.App.4th 1184, 1188-1189 (*Salter*); see also *Strauss v. Superior Court* (1950) 36 Cal.2d 396, 401 (*Strauss*) [“A trustee has the duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information relative to the administration of the trust.”].)

According to these authorities, Ross, as a remainder beneficiary, is not entitled to annual accountings, but is entitled to receive, on request, (1) information concerning the trusts that is reasonably necessary to enable him to enforce his rights under the trust and (2) a report of information concerning the trusts' assets, liabilities, receipts and disbursements, Alley's acts as trustee, and the particulars relating to the trusts' administration relevant to his interest in the trusts. While Ross asserts he is entitled to annual reports or accountings without request, he does not cite any authority to support that assertion. Certainly none of the authorities we have discussed require a trustee to automatically provide reports or accountings, whether annually or at other intervals, to a remainder beneficiary. Instead, the event that triggers the trustee's duty to provide information is a request from the beneficiary. Therefore, the fact that Alley did not provide information to other beneficiaries is irrelevant, since it is undisputed that no beneficiary other than Ross asked for information concerning the trusts.

Here, the trial court found, by a preponderance of the evidence, that when Ross first requested information in 2002 concerning the trusts, Alley timely provided information about them. Substantial evidence supports this finding.⁵ Alley testified that before the first petition was filed, she provided Ross with tax statements and year-end reports on the trusts. Ross's attorney acknowledged in his 2002 letters to Alley that he had receiving accounting information showing the status of the trust accounts at inception and currently, and how the funds were invested over time. In addition, Alley allowed McCarthy and Moss to answer any questions Ross may have had. Thus, the evidence supports the finding that Alley responded to Ross's request for information, as required by sections 16060 and 16061.

The issue then is whether the information Alley provided complied with her duties under sections 16060 and 16061. As stated above, section 16060 requires the trustee to keep the beneficiaries "reasonably informed" about the trust, which the Law Revision Commission comment states is information reasonably necessary to enable the beneficiary to enforce his or her rights under the trust or redress a breach of trust, and is usually satisfied by complying with section 16061. Section 16061, in turn, requires the trustee to provide a "report of information" about the trust's assets, liabilities, receipts and disbursements, the trustee's acts, and the particulars relating to the trust administration relevant to the beneficiary's interest. As *Esslinger* instructs, when a beneficiary petitions the court for information or a particular account after a trustee unreasonably fails to comply with a request for information, the trial court has discretion to grant or deny the petition. (*Esslinger, supra*, 144 Cal.App.4th at p. 520; see also

⁵ Under the substantial evidence review standard, this court must view the evidence in a light most favorable to the judgment and resolve all evidentiary conflicts in favor of the order. (*In re Conservatorship of Davidson* (2004) 113 Cal.App.4th 1035, 1058, disapproved of on an unrelated issue in *Bernard v. Foley* (2006) 39 Cal.4th 794.)

section 17206 [“The court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition, . . . ”]

Here, the trial court exercised its discretion in denying the petition. The court found the information Alley provided Ross pursuant to his petitions, including the evidence presented at trial, satisfied her duties under sections 16060 and 16061. The court explained that while Ross argued that Alley was required to produce her personal bank records and billing statements for all of her legal fees, neither section 16060 nor section 16061 demands the production of trust tax returns, bank records of the trusts’ receipts and disbursements, or the trustee’s personal bank statements or billings. The court found that Ross offered no evidence to support his suspicions that Alley used trust money to pay either the Idaho judgment or legal fees she incurred on non-trust related matters. The court further found that Alley presented evidence showing (1) she paid the Idaho judgment from her personal funds, (2) she did not use trust funds to pay legal fees from the Idaho lawsuit apart from the inadvertent payment to her Idaho attorney that she repaid, and (3) the legal fees charged to the trusts that related to the instant litigation and the action to set aside the final order. The court concluded that neither section 16060 nor 16061 supported the conclusion a trustee is required to provide personal information for the purpose of satisfying a remainder beneficiary’s suspicions of wrongdoing.

The court did not abuse its discretion in so finding. “[I]t is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered.” (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598; *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448.) The trial court correctly noted that neither section 16060 nor section 16061 specifies the detail of information required to be provided to a beneficiary, although section 16061 does state that a trustee is required to provide a “report of information” concerning the assets, liabilities, receipts and disbursements of the trusts, and the trustee’s acts. A report of information, however, is a far cry from the detailed statement

Ross contends is required. Alley provided reports of information concerning her acts as trustee and the trusts' assets, liabilities, receipts and disbursements through the statements she provided before Ross filed this action in 2002, the accounting covering the period from the trusts' inception in September 1997 through December 2002, and the statements Huff prepared for the years 2003 through 2007 which listed the trusts' assets, liabilities, receipts, disbursements, gains and losses.

Based on this evidence, the trial court reasonably could conclude, as it did, that the information Alley provided was sufficient to satisfy her duties under sections 16060 and 16061, and allow Ross to enforce his rights under the trust or redress a breach of trust. Ross asserts the court erred in reaching this conclusion because Docker admitted the brokerage statements were not in compliance with the Probate Code. The testimony to which Ross cites, however, shows that Docker merely agreed that the brokerage accounts probably would not show what a payment to Alley was for; Ross neglects to mention that Docker also testified that, in his opinion, the information Alley furnished Ross before Alley retained Docker probably satisfied her duty to provide information to Ross.

Ross contends the Probate Code requires Alley to provide a report that sets forth a balance sheet and statement of income and expenses because he asked for one, citing *Esslinger*. While Ross is correct that in *Esslinger* the court stated a remainder beneficiary may ask the trial court to order an accounting, the court also stated that it is within the trial court's discretion whether to grant that request. (*Esslinger, supra*, 144 Cal.App.4th at p. 526 & fn. 4.) Here, the trial court did not grant Ross's request; instead, it found that the information Alley provided was sufficient to satisfy her duties under sections 16060 and 16061. The trial court did not abuse its discretion in so finding.

Ross asserts in his reply brief that the issue here is not whether the trial court abused its discretion, but instead is a legal issue, namely whether the accountings complied with her fiduciary duties. While Ross may be entitled to information that is reasonably necessary to enforce his rights under the trust, it is still within the trial court's

discretion to decide the information that will enable him to do so. Here, the court concluded that given Alley's evidence that the disbursements she received from the trust were proper, Ross's suspicions were insufficient to require Alley to produce detailed billings or further evidence. Although a trustee has a duty to provide complete and accurate information, the trial court here concluded Alley satisfied that duty and therefore was not required to produce additional documentation merely because Ross suspected wrongdoing.

In sum, Ross has not shown that the trial court abused its discretion in finding: (1) Alley did not violate a fiduciary or other duty in failing to provide annual accounts under section 16062; (2) Alley did not fail to keep Ross reasonably informed of the trust and its administration as required by section 16060; and (3) the information she provided was sufficient to satisfy her duties under section 16061.

Burden of Proof on Breach of Fiduciary Duty

Ross argues the trial court erred by placing the burden on him to prove a breach of fiduciary duty. Ross asserts that, regardless of whether Alley was required to produce detailed records pursuant to section 16061, once she produced statements concerning the trusts it was her burden to prove the information in them was correct. Ross reasons the only way she could do that was by producing legal billings to substantiate the attorney fees and costs she charged to the trusts, and her failure to produce the billings means Alley failed to satisfy her burden of proof.

The trial court viewed this action as one for breach of fiduciary duty. In his petitions, Ross claimed Alley breached her fiduciary duties in failing to provide accountings, using trust assets in violation of the trusts' terms, and violated the Uniform Prudent Investor Act, and requested the court to surcharge Alley for any improperly appropriated funds and remove her as trustee. Accordingly, the court concluded it was Ross's burden to prove the facts essential to his claims.

A trust beneficiary has the initial burden of proving a trustee's failure to perform his or her fiduciary duty; the burden then shifts to the trustee to justify its actions. (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 853.) While a fiduciary such as a trustee may have the initial burden of establishing the correctness of the trust accounts, a fiduciary does not have the burden of disproving charges of dereliction of duty. (*Neel v. Barnard* (1944) 24 Cal.2d 406, 419-420; *Rivero v. Thomas* (1948) 86 Cal.App.2d 225, 236.) "The trustee is entitled to the benefit of the presumptions of regularity and good faith." (*Neel, supra*, 24 Cal.2d at p. 421.)

To the extent Alley was required to establish the correctness of the trust accounts, the trial court found she did so. Specifically, the court found Alley presented evidence showing that, with the exception of the \$3,500 she inadvertently paid to her Idaho attorney (but promptly repaid to the trusts) and the principal she received while McCarthy was her financial advisor, the only other money disbursed from the trusts was for legal fees and costs incurred in litigating this action and the action to set aside the final order, and the income from the trust funds to which she was entitled.

While Ross contends Alley's evidence concerning the legal fees and costs incurred in the trust-related actions was insufficient to support the charges against the trusts, the court was free to accept or reject the evidence. "Substantial evidence may consist of the testimony of a single witness or even the testimony of a party." (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 518.) Ross complains the letters concerning the fees and costs charged to the trusts were produced for the first time at trial and did not detail the work performed; Ross, however, did not object to the admission of the letters into evidence at trial or assert that the court should limit the use of the evidence. Since the letters were in evidence, the statements in the letters concerning the amount of fees and costs incurred and their relation to this lawsuit and the set aside action, as well as

Docker's trial testimony on those issues, provided sufficient evidence from which the court could find the amount and purpose of the fees and costs charged to the trusts.

Since Alley provided the information required by sections 16060 and 16061, if Ross believed Alley's use or management of the trust funds was inappropriate or wrong, it was his burden to prove it. The cases he relies on do not compel a different result. In *Estate of McCabe* (1950) 98 Cal.App.2d 503, the trustee sought court approval of an accounting for the trust she had been managing for her daughter, the beneficiary. The appellate court explained that upon a settlement, all presumptions are against a trustee who negligently fails to keep true accounts, and it is the trustee's "duty to prove every item of their account by 'satisfactory evidence'; the burden of proof is on them and not on the beneficiary; and any doubt arising from their failure to keep proper records, or from the nature of the proof they produce, must be resolved against them." (*Id.* at p. 505; see also *Blackmon v. Hale* (1970) 1 Cal.3d 548, 560 [co-trustee liable to beneficiary who demanded return of trust money for amount of trust money that was unaccounted for when co-trustee had no explanation regarding its disposition]; *Purdy v. Johnson* (1917) 174 Cal. 521, 531 [on settlement of trust account, trustees have duty to support every item of the account and if they fail to support the correctness of the charge or credit by satisfactory evidence, the item must be disallowed].) In the instant case, the presumption does not come into play because, unlike *McCabe*, *Blackmon* and *Purdy*, the trust accounts are not being settled, and Alley produced satisfactory evidence that the items in the account were correct.

In sum, the court did not err in finding that it was Ross's burden to prove Alley's breach of fiduciary duty.

Invasions of Principal

Ross asserts Alley repeatedly invaded the principal of the trusts without complying with the conditions for her to do so. As Ross points out, the trusts both provide that Alley is entitled to monthly payments of the net income of each trust, "plus

so much of the principal as the Trustee, in its discretion, may from time to time consider suitable or necessary for the maintenance and support in health and reasonable comfort of [Alley] having in mind her other sources of income and her other resources which are known to the Trustee.” Ross contends that under this provision, before Alley could invade the principal she had to show that her other sources of income were inadequate, and her ample resources and admitted failure to conduct any such analysis rendered her invasions of principal improper.

The only invasion of principal that the trial court found was Alley’s inadvertent use of principal on McCarthy’s advice. The court found this constituted an unauthorized taking of principal because the trusts clearly require her to make a discretionary judgment that the use of principal is necessary to her care and comfort, after considering her other resources, and Alley admitted she made no so judgment.

Ross contends, however, that Alley also invaded the principal when she took monthly distributions even though the trusts showed losses almost every year. The trial court found that Ross offered neither expert opinion nor legal authority to support his assertion that Alley’s calculation of trust income was improper. The court further found that Huff’s testimony concerning the calculation of trust income and the propriety of his calculation method was essentially unrefuted, and Docker’s testimony concerning the allocation of charges between principal and income was wholly consistent with the mandates of sections 16370 and 16371. Accordingly, the court found Ross’s argument must fail considering Jack Ross’s express intention that the trusts be managed primarily to provide income to Alley for her care and support, and not necessarily for the preservation of their principal.

Substantial evidence supports the trial court’s findings. Huff explained that net income is determined by deducting allocable expenses from gross income and even when trust assets were sold at a loss to pay attorney fees, the losses are not subtracted from income in order to determine distributions of net income to an income beneficiary. Ross

makes no effort on appeal to explain Huff's opinion. He asserts Alley was taking out the gross income, but did not offer any evidence to support that conclusion. Since Alley did not take out principal when she received the net income from the trusts, it was unnecessary for her to analyze whether her other sources of income were sufficient to support her when taking income distributions. Accordingly, evidence of Alley's financial condition is irrelevant.

In sum, Ross has not shown that the trial court erred when it found there was no evidence to support Ross's request that Alley be surcharged for invasions of principal.

Attorney Fees and Costs Charged to the Trusts

At trial, Ross argued Alley should be surcharged for any deductions from trust principal to pay legal fees because the legal fees incurred in defending against his petitions in this case could have been avoided had Alley complied with her duties and the legal fees incurred in defending against the set aside action were not incurred for the trusts' benefit or to preserve their assets. The trial court, however, found that Alley properly charged the trusts for legal fees reasonably incurred in defending this lawsuit and the set aside action, and denied Ross's request to find the amount of fees charged to be unreasonable in consideration of the litigation involved. Ross asserts the court erred in its findings because (1) under the final order, Alley was permitted to charge legal fees to the trusts only if the fees related to the preservation of the trusts themselves, (2) without the legal billings, it could not be determined whether the fees and costs were actually incurred in trust-related litigation, and (3) before reimbursing herself for legal fees, Alley had to determine whether her other sources of income were inadequate.

Section 15684 provides: "A trustee is entitled to the repayment out of the trust property for the following: [¶] (a) Expenditures that were properly incurred in the administration of the trust. [¶] (b) To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust." "Attorneys hired by a trustee to aid in administering the trust are entitled to reasonable fees paid from trust

assets. Preparing the accounting and responding to the beneficiaries' objections to that accounting are aspects of trust administration.” (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 235.) A trustee is also entitled to attorney fees incidental to litigation that benefits the trust. (*Thomas v. Gustafson* (2006) 141 Cal.App.4th 34, 44.) Moreover, paragraph 4(a)(ix) of the final order provides that expenses incurred by the trustee in managing and protecting trust assets, and administering the trust estate, shall be a charge upon the trust expense.⁶

Attorney fees and litigation costs incurred in the trustee's successful defense of an action brought by the beneficiary are recoverable. (*Estate of Gump* (1991) 1 Cal.App.4th 582, 604 (*Gump*); see, e.g., *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97 [successful defense of allegations against trustee benefited trust by eliminating questions regarding whether the trustee had properly administered trust]; *Estate of Cassity* (1980) 106 Cal.App.3d 569, 574 (*Cassity*) [former trustee entitled to reimbursement of legal expenses where he successfully defended himself from surcharge for conduct determined

⁶ Paragraph 4(a) of the final order provides, in pertinent part: “a. Powers of Trustee: Subject to any limitations stated elsewhere in this Trust with respect to the discharge by the Trustee of the Trustee's fiduciary duties, and always in adherence to fiduciary standards, the Trustee may deal with all of the Property of this Trust in the Trustee's discretion as the Trustee deems advisable, the same as if the Trustee were the sole legal and beneficial owner thereof and the Trustee shall not be liable to any person, firm or corporation for the exercise or failure to exercise any discretion in connection with acquiring, holding, managing, preserving or administering this Trust, or, in the distribution of principal or income of this Trust pursuant to the dispositive provisions hereof. . . . Without limitation upon the foregoing and in addition to all Trustee's powers provided by law or elsewhere in this Trust the Trustee shall have the following powers and discretion: [¶] (ix) To employ and compensate at the expense of the Trust such agents, attorneys, investment counselors, investigators, accountants, bookkeepers and other persons as in the Trustee's judgment are reasonably necessary for the proper management and protection of Trust assets and the administration of the Trust Estate. [¶] (x) Anything done by the Trustee pursuant to any of the powers herein granted or given to the Trustee by law shall be done at the sole risk and expense of the Trust Estate and at no risk to the Trustee.”

to have been proper]; see also § 16247 [trustee has power to retain attorneys to advise or assist the trustee].) The trust, however, may not be charged with fees incurred in unsuccessfully contesting a trustee's surcharge. (*Gump, supra*, 1 Cal.App.4th at p. 605; *Metzenbaum v. Metzenbaum* (1953) 115 Cal.App.2d 395, 401-402.) Also, fees may not be assessed if the trustee breached the trust unless the trust benefited in some way. (§ 15684; *Gump, supra*, 1 Cal.App.4th at p. 605; *Estate of Vokal* (1953) 121 Cal.App.2d 252, 258-261 (*Vokal*); see also *Estate of Gilmaker* (1964) 226 Cal.App.2d 658, 662 (*Gilmaker*).) We review these matters for an abuse of discretion. (*Estate of McLaughlin* (1954) 43 Cal.2d 462, 465; *Gump, supra*, 1 Cal.App.4th at p. 597; *Cassity, supra*, 106 Cal.App.3d at p. 572; Rest.2d Trusts, § 243.)

Ross asserts the trial court erred in permitting Alley to be reimbursed from the trust for non-trust related matters, and defending her invasions of principal and her failure to comply with her mandatory, non-waivable duties under sections 16060 and 16061. With respect to non-trust related matters, the trial court found that the legal expenses Alley charged to the trusts were incurred in trust-related litigation. Ross asserts the legal fees and costs Alley charged to the trusts may have been incurred in matters unrelated to the trusts or the set aside litigation. He has no evidence of this, other than pointing to statements in Docker's letters that Alley was not entitled to reimbursement from the trusts for legal services rendered in a non-trust related matter and that there was an issue concerning whether a trailer was an asset of the marital trust, which Ross contends was a non-trust related matter. Ross argues that because Alley was involved in non-trust related litigation during the course of this lawsuit, the court should have ordered the detailed legal billings produced at trial so he could verify that the fees and costs Alley charged the trusts actually were incurred in trust-related litigation.

As explained above, the trial court had sufficient evidence from which it could determine whether the fees incurred were related to the trusts. If Ross wanted to review the billings, he could have demanded their production before trial and brought a motion

to compel if Alley refused to produce them. (See, e.g., *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 205-206; *Strauss, supra*, 36 Cal.2d at p. 401; *Coberly v. Superior Court* (1965) 231 Cal.App.2d 685, 690.) Although Ross stated in his trial brief that Alley refused to provide any documentation or evidence of her legal bills despite his demand for them, and states on appeal that Alley refused to provide any of the detailed billings since she claimed they were privileged, nothing in the record shows that Ross brought a motion to compel the production of such evidence. The trial court certainly did not abuse its discretion in refusing to order production of documents that Ross could have attempted to obtain before trial.

Ross also points out that fees may not be assessed where a trustee has committed a breach of trust, citing *Vokal, supra*, 121 Cal.App.2d at p. 260. But here the trial court found that Alley had not committed any such breach and did not have a duty to provide annual accounts. The court did find Alley's inadvertent taking of \$18,762.30 in principal from the trusts on McCarthy's advice was not authorized by the trusts and ordered her to repay it. While this finding could have justified a reduction in the fees recoverable, the court still had discretion to find Alley was entitled to the entire amount of fees incurred, particularly since the majority of charges against Alley were disproven. (See, e.g., *Cassity, supra*, 106 Cal.App.3d at pp. 574-575 [concluding the assessment of some surcharges against the trustee was not grounds, in itself, for completely denying the trustee compensation and expenses, particularly where most of the charges were disproven and a considerable portion of his efforts and expenditures necessarily were incurred for protecting himself from an unjust surcharge].)

The cases on which Ross relies, *Terry v. Conlan* (2005) 131 Cal.App.4th 1445 and *Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, are distinguishable, as they involved trustees who prosecuted or defended actions over who would enjoy the benefits of and control the trusts, and were not representing the interests of the trust or the trustee. In contrast here, Alley was not defending the actions for her own benefit, but instead was

defending her actions as trustee in managing the trusts' assets and, as the trial court found with respect to the set aside action, seeking to preserve Jack Ross's original intent in establishing the trusts.

In sum, Ross has not shown the trial court abused its discretion in determining that Alley's reimbursements for legal fees and costs were proper.

Removal as Trustee

Finally, Ross argues the court erred in denying his request to remove Alley as trustee. In the proceedings below, Ross alleged numerous grounds supported his request, including Alley's (1) admitted invasion of principal without knowing she had done so, (2) failure to keep the trust accounts separate, (3) failure to pay the principal back even after she learned she had received it, (4) failure to prepare accountings for the trusts until she was sued, (5) failure to voluntarily provide information to the beneficiaries, and (6) her provision of information to Ross only after he filed petitions to compel her to do so.

The court rejected Ross's request to remove Alley as trustee, finding (1) Alley did not refuse to provide Ross with a report of information concerning the trusts and was not required to provide annual accountings, (2) Alley provided Ross with sufficient information to satisfy her duties under sections 16060 and 16061, (3) Alley reasonably relied on the advice of McCarthy, the family's long time trusted financial adviser, and exercised reasonable care in reviewing his actions as an agent for the trusts and otherwise managing their assets, (4) Alley's decision to change investment advisers, after the disclosure of McCarthy's miscalculations of trust income, confirms her independent judgment as trustee, and (5) any violation of Alley's fiduciary duty based on her unintentional use of principal was done in reasonable reliance on the advice of her financial adviser and therefore was in good faith. The court concluded that there was no evidence to support Alley's removal as trustee.

On appeal, Ross argues Alley should have been removed as trustee because the trial established (1) Alley was not keeping accounts prior to the first petition, (2) she had her attorneys prepare accountings, (3) she did not know she had invaded the principal, (4) she relied on her attorneys, stockbrokers or accountants to determine what net income she would receive, (5) she could not explain what attorney fees were being charged to the trusts, and (6) despite losses in the trusts, Alley could not explain why she was taking income.

Removal of a trustee is governed by section 15642, which includes several specific grounds for removal, including breach of trust and a failure to act (*id.*, subds. (b)(1), (4)), as well as the catch-all, “[f]or other good cause.” (*Id.*, subd. (b)(9).) In light of the catch-all, section 15642 effectively continues the preexisting rule placing the decision to remove a trustee in the sound discretion of the trial court. (*Gilmaker, supra*, 57 Cal.2d at p. 633; *Estate of Bixby* (1961) 55 Cal.2d 819, 826.) Nonetheless, “this is a power that the court should not lightly exercise.” (*Estate of Bixby*, at p. 826.) The trial court should be particularly restrained when asked to remove a trustee specifically named by the trustor, as was Alley. In such cases, the trustee is to be removed “only for extreme grounds, such as incapacity, dishonesty, or lack of the qualifications necessary to administer the trust.” (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 287.) The court’s grant or denial of a petition to remove a trustee is reviewed for abuse of discretion. (*Goto v. Goto* (1960) 187 Cal.App.2d 603, 609.)

The only argument Ross presents for Alley’s removal is his contention that she did not exercise independent judgment as trustee and instead let her attorneys and financial advisers make decisions concerning the trusts. The trial court, however, found that Alley did exercise independent judgment with respect to management of the trusts, as evidenced by her decision to replace McCarthy as financial adviser. The court correctly noted that a trustee is entitled to delegate her investment and management functions to an investment adviser pursuant to section 16052, and while section 16047 requires the

trustee to exercise prudence in selecting an adviser and reviewing his or her acts, Ross failed to demonstrate that Alley imprudently selected an agent to manage the trusts' assets or that she failed to manage trust assets with reasonable care, skill or caution.

Ross has failed to show an abuse of discretion. There was evidence from which the court reasonably could find that Alley exercised independent judgment in her dealings with her attorneys and financial advisers. Alley established an investment plan with McCarthy and she later determined it was prudent to transfer the trusts' assets to another financial adviser. She kept separate accounts for the trusts. Alley testified she made investment decisions after receiving advice from her attorneys, accountant, and husband. While section 16012, subdivision (a) prohibits a trustee from delegating to others the performance of acts the trustee can reasonably be required to perform, a trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisors, appraisers or other agents, to advise or assist the trustee in the performance of administrative duties (§ 16247), and may delegate investment and management functions as prudent under the circumstances (§ 16052.) Alley has the power to retain financial advisers, accountants, and attorneys to perform such functions as managing investment accounts, calculating the income to which Alley was entitled, constructing account statements, or providing legal advice. While Ross asserts that the professionals Alley retained failed in their duties and Alley is responsible for their failures, he does not explain how they failed and the trial court found otherwise. The court did not abuse its discretion in denying Ross's request to remove Alley as trustee.

DISPOSITION

The judgment is affirmed. Alley shall recover her costs on appeal.

Gomes, J.

WE CONCUR:

Ardaiz, P.J.

Levy, J.